

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBRA A. CRANE)	
Claimant)	
)	
VS.)	
)	
JOHNSON CONTROLS, INC.)	
Respondent)	Docket No. 219,544
)	
AND)	
)	
HOOVER UNIVERSAL INC.)	
Insurance Carrier)	

DEBRA A. CRANE)	
Claimant)	
)	
VS.)	
)	
K-MART CORPORATION)	
Respondent)	Docket No. 262,350
)	
AND)	
)	
CAMBRIDGE I.H.D.S.)	
Insurance Carrier)	

ORDER

The respondent, Johnson Controls Inc., and its insurance carrier, Hoover Universal Inc., request review of an Order entered by Administrative Law Judge Steven J. Howard on November 7, 2001.

ISSUES

The claimant filed an application for preliminary hearing in Docket No. 262,350. The claimant also filed an application for post-award medical treatment in Docket No. 219,544.

The two cases were consolidated for hearing in an Order of Consolidation dated November 1, 2001. Judge Howard determined claimant was entitled to additional medical treatment and the costs for providing the medical treatment were assessed against Johnson Controls Inc., and Hoover Universal Inc., (hereinafter Johnson Controls), the respondent and insurance carrier, respectively, in Docket No. 219,544.

Johnson Controls contends it should not be liable for those benefits because claimant suffered a subsequent intervening injury while employed with K-Mart. The alleged subsequent injury or aggravation is the subject of Docket No. 262,350.

The respondent, K-Mart Corporation, and its insurance carrier, Cambridge I.H.D.S., (hereinafter K-Mart) the respondent and insurance carrier, respectively, in Docket No. 262,350, contend claimant's back condition is the natural and probable consequence of her injury suffered while employed by Johnson Controls. In the alternative, K-Mart raises the following issues on review: (1) whether the claimant suffered personal injury by accident arising out of and in the course of her employment with K-Mart; (2) whether claimant provided proper notice to K-Mart; and, (3) whether the Board has jurisdiction to determine the liability of the respondents.

The claimant adopted K-Mart's analysis of the case with the exception that claimant contends she did provide K-Mart with proper notice. The claimant further noted the Board lacks jurisdiction to decide the appeal, describing it as only a dispute between insurance carriers.

The issue for determination by the Board is whether the claimant is entitled to post-award medical benefits in Docket No. 219,544 or whether she has sustained a subsequent intervening accident in Docket No. 262,350.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

1. On June 24, 1996, claimant suffered a work-related back injury while employed by Johnson Controls. Claimant was diagnosed with degenerative disc disease of the lumbosacral spine and a herniated disc at L4-5. A workers compensation claim was filed and resolved by settlement hearing on October 27, 1997, in Docket No. 219,544. The settlement specifically left open the right to seek additional medical treatment.

2. Claimant testified she continued to experience back problems while working for Johnson Controls after the settlement of her case. She testified she considered seeking additional medical treatment for her continuing back pain. However, she noted that her work schedule required working two days followed by two days off and while she was off

work her back pain would subside. Therefore, she kept putting off seeking additional medical treatment for her back.

3. The claimant continued working for Johnson Controls until she was laid off on October 15, 1999. After being laid off at Johnson Controls, the claimant was unemployed for approximately six months. Claimant obtained employment with K-Mart in May 2000 as a stocker in the lingerie department. When she applied for employment at K-Mart she disclosed her prior back injury and was provided a light duty job. Claimant noted that her co-employees would load items in a cart and she would then take the items from the cart and stock the shelves. Claimant would sit on a stool while stocking the lower shelves.

4. The job at K-Mart required claimant to stand for most of her eight hour shift. She also was required to do some bending and stooping. The claimant began to have flare ups of back pain and notified her employer when that occurred. She also began to miss work because of the back pain. She ultimately left her employment with K-Mart on October 24, 2000, because of her back pain.

5. The claimant testified that while she continued working at Johnson Controls her back pain would increase on the days she worked and subside when she was off work. She noted the same waxing and waning of her back pain while working for K-Mart. She concluded that after terminating her employment with K-Mart her back was not any worse than after she settled her claim and continued working for Johnson Controls.

6. Claimant had not sought treatment for her back from August 1997 until October 2000. She saw Dr. Jeffrey T. MacMillan, M.D. on October 24, 2000, and he noted claimant had developed significant degenerative changes of the L4-L5 disc in the four years since her lumbar MRI of October 24, 1996. When questioned regarding the causation for the changes, Dr. MacMillan opined the degenerative changes were not the result of any specific accident or injury but were the result of age-related degenerative changes. The doctor concluded that while activity may provoke discomfort, it does not significantly affect the evolution of claimant's condition.

7. The claimant was evaluated by Robert M. Murphy, M.D. at the request of her attorney. Dr. Murphy diagnosed claimant with degenerative disc disease at L4 with mild radiculopathy. After examination and review of claimant's history, Dr. Murphy opined claimant had sustained a significant back injury in June 1996 with resultant back pain that had not resolved since that time. The doctor noted claimant needed additional medical treatment. The doctor further opined claimant's back pain is appropriately exacerbated by various activities but noted claimant had not sustained any additional insult or injury to her lower back since the 1996 accident. Accordingly, the doctor concluded all of claimant's current symptoms are the result of the 1996 accident.

8. The claimant was evaluated by Edward J. Prostic, M.D., at the request of K-Mart's attorney. Dr. Prostic opined claimant has low back dysfunction with radicular

symptoms that appear to be the natural progression of her 1996 injury rather than as a consequence of injury while employed by K-Mart.

CONCLUSIONS OF LAW

Both K-Mart and claimant argue the Board does not have jurisdiction to review this matter. The claimant described the appeal as a dispute between insurance carriers. The Board disagrees with the claimant's contention. These are claims involving different employers, not two insurance carriers for the same employer. K-Mart further argues that the present appeal by Johnson Controls does not raise a jurisdictional issue for appeal from a preliminary award.

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment is due to the admitted work-related accident or whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of her prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

Because the instant proceeding consolidated a post-award application for additional medical benefits with an application for preliminary hearing, it should also be noted that an appeal from a finding in a post-award application for medical benefits is subject to full review by the Board.³

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁴ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced

¹K.S.A. 44-551(b)(2)(A).

²K.S.A. 44-534a(a)(2).

³ K.S.A. 44-510k (a).

⁴Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

by an independent intervening cause.⁵ Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

In general, however, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity at K-Mart aggravated, accelerated or intensified the underlying disease or affliction.⁶

The claimant testified her low back pain has returned to the same condition it was while she was working for Johnson Controls. Moreover, both Drs. Prostic and Murphy concluded the claimant's current condition was caused by and is a natural consequence of her work-related accident in June 1996 while employed by Johnson Controls. The medical records introduced at the hearing before the Administrative Law Judge do not contain any other indication that claimant's employment at K-Mart aggravated, accelerated or intensified her preexisting condition.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Board finds that claimant's work at K-Mart following her employment with Johnson Controls, though a factor in claimant's increased symptoms, was not an intervening injury. Her condition, therefore, is compensable as a direct and natural consequence of the original June 1996 injury. Accordingly, Johnson Controls should remain liable for claimant's ongoing medical treatment. The Order for Johnson Controls to provide medical treatment in Docket No. 219,544 should, therefore, be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated November 7, 2001, should be and is hereby affirmed.

IT IS SO ORDERED.

⁵Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

⁶See, Boutwell v. Domino's Pizza, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Dated this _____ day of February 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: J. Paul Maurin, III, Attorney for Claimant
Michael J. Haight, Attorney for Johnson Controls, Inc.
Clifford K. Stubbs, Attorney for K-Mart Corp.
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director